



The Weekly Update of Texas Insurance News

## TEXAS INSURANCE LAW NEWSBRIEF



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### **KNOWN-FALSITY EXCLUSION APPLIES TO VICE-PRINCIPALS AS WELL AS TO CORPORATE OFFICERS**

Last Friday, the Supreme Court of Texas held that a CGL exclusion applicable to defamatory statements applied to preclude coverage even though no corporate officers had knowledge that the defamatory statements were false when made by employees. In *Chrysler Insurance Company v. Greenspoint Dodge of Houston, Inc.*, 2009 WL 3494981 (Tex. October 30, 2009), the defamation claim arose from remarks and accusations directed at an employee of Greenspoint Dodge by Greenspoint Dodge's manager. The Court explained that "[a] corporation's knowledge . . . is not limited to what its officers know, but may include other employees' knowledge, if those employees are corporate vice-principals." Accordingly, the Court disagreed with the court of appeals' application of the known-falsity exclusion and concluded that the policy did not provide liability coverage for the underlying defamation claim.

### **FIFTH CIRCUIT FINDS WAIVER AND ESTOPPEL DID NOT EXPAND RISKS COVERED BY INSURANCE POLICY**

Last Monday, the Fifth Circuit affirmed summary judgment in favor of Potomac based on a fungus exclusion in a property insurance policy issued to Pierre. *Pierre v. Potomac Insurance Company of Illinois*, No. 08-11022, 2009 WL 3444790 (5th Cir. October 26, 2009), involved a hail damage claim involving water and mold damage to a shopping center located in Arlington, Texas. The U.S. District Court for the Northern District of Texas granted summary judgment in favor of the insurer based on a fungus exclusion first asserted after a motion to dismiss was denied and appraisal was ordered and completed.

The Fifth Circuit upheld the Northern District's decision finding that application of the exclusion was not barred by waiver or estoppel even though Potomac failed to seek leave to amend its answer to include the exclusion as a policy defense until over three years after suit was filed. The Northern District explained that, "although waiver and estoppel may operate to avoid a forfeiture of [an insurance] policy," they may not "change, rewrite and enlarge the risks covered by [an insurance] policy."

### **COURT FINDS WORKERS COMP CLAIMANT FAILED TO EXHAUST ADMINISTRATIVE REMEDIES - TRIAL COURT HAD NO JURISDICTION**

The Dallas Court of Appeals recently held that a claimant's failure to exhaust administrative remedies under the workers' compensation act prior to filing suit divests the trial court of subject matter jurisdiction over the lawsuit. *Johnson v. Zurich American Insurance Company*, No. 05-09-00087, 2009 WL 3337663

(Tex. App.—Dallas, October 19, 2009). The Court recognized that the legislature vested the Division of Workers' Compensation with exclusive jurisdiction to determine a claimant's entitlement to medical benefits, and when the legislature grants an administrative body the sole authority to make an initial determination in a dispute, the agency has exclusive jurisdiction over the dispute.

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